In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-364

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

GARY LEROY DOUGLAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
State Office Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioner

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	12
Appendix A: Opinion of Court of Appeals	15
Appendix B: Opinion of District Court	22
Appendix C: Appellant's Brief, *State v. Douglas* (excerpt)	25

TABLE OF AUTHORITIES

Cases

	Page
Boyd v. State, 351 So.2d 1041 (Fla. App. 1976)	10
Chapman v. California, 386 U.S. 18 (1967)	7
Commonwealth v. Williams, —— Pa. Super. ——, 381 A.2d 1285 (1977)	10
Doyle v. Ohio, 426 U.S. 610 (1976)	6, 7, 8
Miranda v. Arizona, 386 U.S. 436 (1966)	6, 7
Smith v. State, 140 Ga. App. 385, 231 S.E.2d 83 (1976)	9, 12
State v. Douglas, 23 Or. App. 221, 541 P.2d 833 (1975)	1, 3
United States v. Guzman, 446 F.2d 1137 (9th Cir. 1971), cert. denied 404 U.S. 1022 (1972)	11, 12
United States v. Hale, 422 U.S. 171 (1975)	6, 7, 9
United States v. Ivey, 546 F.2d 139, reh. denied 550 F.2d 243 (5th Cir.), cert. denied sub nom. Taglione v. United States, 431 U.S. 943 (1977)	8, 9

Constitutional and Statutory Provisions

United States Constitution, Amendment V	2, 3
United States Constitution, Amendment XIV	3
28 U.S.C. § 1254	2
28 U.S.C. §§ 2241 et seq.	4
Fed. R. Civ. P.12	4

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

GARY LEROY DOUGLAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Hoyt C. Cupp, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1978, Apendix A to this petition.

OPINIONS BELOW

A notation that the Court of Appeals of the State of Oregon affirmed Douglas' burglary conviction without opinion appears at 23 Or. App. 221, 541 P.2d 855 (1975).

The opinion of the United States District Court for the District of Oregon, rejecting Douglas' claim that

his Fifth Amendment rights were violated by the testimony of a police officer that Douglas made no statements when arrested, Appendix B to this petition, is not reported.

The opinion of the United States Court of Appeals for the Ninth Circuit, holding that a single negative answer to the question, "Did [Douglas] make any statements to you [when you arrested him]?" violated Douglas' Constitutional rights, Appendix A to this petition, is not yet reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on July 13, 1978. No petition for rehearing was filed, and this petition was filed within 90 days of the court of appeals' decision. This Court's jurisdiction is invoked under 28 U.S C. § 1254(1).

QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments require the setting aside of a state-court criminal conviction in which a single reference is made, during trial, to the fact that the accused said nothing upon being arrested, on the theory that any testimony whatever concerning that fact impermissibly penalizes the accused's exercise of his Constitutional right to remain silent, even though the testimony in question makes no reference

to that Constitutional right and is not utilized, either as proof of guilt or for purposes of impeachment?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Douglas was convicted, upon trial by jury in the circuit court for Coos County, Oregon, of burglary in the first degree and was sentenced to the Oregon State Penitentiary for an indeterminate term, not to exceed 15 years (see R. 1-3).[1] The Oregon court of appeals affirmed Douglas' conviction without opinion. *State v. Douglas,* 23 Or. App. 221, 541 P.2d 833 (1975).

---

[1] Because the majority opinion of the United States Court of Appeals summarily rejected the possibility that any error which occurred in this case was harmless, in view of the "rather unusual, perhaps even bizarre" circumstances of the case and the "equivocal nature" of the evidence—characterizations which, we think, are exaggerated—a summary of the evidence adduced on trial, taken verbatim from Douglas' brief in the Oregon court of appeals (Ex. 3 in these proceedings), is set forth as Appendix C to this petition.

Douglas then sought federal habeas corpus relief, pursuant to 28 U.S C. §§ 2241 et seq. The district court, per Skopil, J., dismissed Douglas' petition, pursuant to Fed. R. Civ. P. 12 (Appendix B, below). The court of appeals reversed the judgment of the district court, in an opinion by Smith, J., which was joined in by Ely, J., and dissented from by Carter, J. (Appendix A, below).

Only one issue was raised in these habeas corpus proceedings and, for that matter, in the state-court appeal which preceded them (see R. 3; Ex. 3). During Douglas' trial, a deputy sheriff testified that he had investigated the burglary with which Douglas was charged, had discovered a cassette tape in a tape recorder taken in the burglary, had unsuccessfully attempted to obtain fingerprints from that cassette, and had obtained no meaningful information from one potential witness who was stipulated to be incompetent (Ex. 2 (Trial Tr.) at 154-158). Then, at the very end of his direct examination of this witness, the prosecutor asked:

> Q Who arrested Mr. Douglas?
> A I did.
> Q Did he make any statements to you?
> A No (*Id.* at 158-159).

Defense counsel promptly moved for a mistrial, contending, outside the jury's presence that "the defendant's refusal to testify against himself has just

been brought squarely before the jury" (*Id.* at 159). After some discussion, the trial judge denied defendant's motion, saying:

> The defendant's motion for an order of mistrial will be denied. The Court has had an opportunity to examine the case of the State against Jacobs, which appears at 219 NW2d beginning at Page 768. In that case, there are some very material differences. First, there was evidence regarding a statement taken from another person which, it could be inferred, implicated the defendant in that case. Then, there was evidence in that case that the accomplice was advised of his rights and that he did make a statement, and then there was evidence that the defendant, Jacobs, was advised of his rights and declined to make a statement. This is a good deal more than what we have here.
>
> This Court isn't saying that I approve of asking the questions that were asked here, but I don't think the defendant—that there is any necessary prejudice in what was asked here and the answer that was given.
>
> [Defendant's] motion will be denied. . . . (*Id.* at 161-162).

The trial continued, and there was no further reference to this matter.[2]

The district court held that this matter "did not result in prejudice of constitutional dimensions, if at all," and that on the record of this case, "any error by

[2]Defense counsel did not request that the jury be instructed to disregard the question and answer to which he had objected, and the trial court, apparently deeming it preferable not to call attention to the matter again, did not give such an instruction on its own motion (see Ex. 2 (Trial Tr.) at 159-162).

the trial court was harmless beyond a reasonable doubt" (see Appendix B, below). Two of the three judges of the court of appeals who decided this case held that the matter was both Constitutional error and not harmless. The dissenting judge disagreed with both aspects of the majority opinion (see Appendix A, below).

REASONS FOR GRANTING THE WRIT

A. The court of appeals has decided an important question of Constitutional law in a manner not in accordance with the applicable decisions of this Court.

This Court has held that the prosecution cannot use evidence of an accused's silence after *Miranda* warnings are given, either as affirmative proof of guilt or for purposes of impeachment. See, *e.g., Doyle v. Ohio,* 426 U.S. 610 (1976); *Miranda v. Arizona,* 384 U.S. 436 (1966). See also *United States v. Hale,* 422 U.S. 171 (1975). We do not quarrel with that rule; but we do quarrel with its extension herein by the court of appeals, and with the court's application of that rule, as extended, to the facts of this case.

As the dissenting opinion herein correctly recognizes, nothing in *Doyle, Hale,* or *Miranda* compels the conclusion that any mention whatever of the fact that an accused made no statement at the time of his arrest is Constitutional error, even when, as in this case, (1)

there is no evidence that the accused was advised of, or aware of, his Constitutional rights; (2) there is no testimony that he was interrogated, before or after he was taken into custody; (3) there is, consequently, no suggestion that his silence was an exercise of his Constitutional rights; and (4) there is no attempt by the prosecution to utilize the accused's silence, either as evidence of guilt or as something inconsistent with his trial testimony. To the contrary, as the majority and dissenting opinions in *Doyle* both recognize (see 426 U.S. at 617, 623-625), an accused's silence at the time of arrest is, at best, ambiguous, even when—indeed, perhaps *especially* when—his silence follows *Miranda* warnings. That very ambiguity makes it difficult to conclude that a bare statement that the accused said nothing at the time of arrest infringes upon the accused's right to remain silent.

Still less, as the dissenting opinion herein again correctly points out, is there anything in *Doyle, Hale,* or *Miranda* which compels the conclusion that such a Constitutional error, if Constitutional error it be, cannot be held harmless under the standards enunciated in *Chapman v. California,* 386 U.S. 18 (1967), when, in addition to the factors just mentioned, there is overwhelming evidence of the accused's guilt, including the testimony of the burglary victims that they saw property stolen from their residence in

defendant's automobile and that defendant admitted committing the burglary to them. To the contrary, this Court seems to have attached some significance to the fact that, in *Doyle,* the State of Ohio had not claimed that the error in that case was harmless. 426 U.S. at 619-620.

B. The court of appeals has decided an important question of Constitutional law or which the decisions of several jurisdictions, state and federal, are in conflict.

While there are numerous decisions involving references to an accused's silence at the time of arrest, comparatively few seem to address the question of whether mention of the accused's silence can be so *de minimis* as not to present a Constitutional question at all. Those that appear to do so, however, seem to be in conflict.

Thus, in *United States v. Ivey,* 546 F.2d 139, reh. denied 550 F.2d 243 (5th Cir.), cert. denied sub nom. *Taglione v. United States,* 431 U.S 943 (1977), the Fifth Circuit disposed of a contention similar to that presented in this case as follows:

> . . . Finally, defendant Taglione claims that allowing proof he admitted to Officer Murphy that he was the pilot of the airplane and gave the name of the individual who owned the aircraft, then did not answer any other questions, was an impermissible attempt to impute guilt by bringing to the jury's attention a refusal to answer questions. This

> is entirely too speculative to merit consideration. There was no argument to the jury of inference of guilt by silence. See *Doyle v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 48 L. Ed. 2d 91 (1976). The government had a right to advise the jury of Taglione's admissions. No request for an instruction to disregard was made, and there was no error in refusing the demand for a mistrial. 546 F.2d at 144-145.

We submit that the inconsistency between the decision in *Ivey* and the decision in the present case, in which where was likewise no argument to the jury of inference of guilt by silence (and, incidentally, no request for an instruction to disregard the testimony collaterally challenged in these proceedings), warrants resolution by this Court. In addition, however, at least three states have rendered decisions on the question presented herein which, at least to the extent that they are based on the Constitution, add to the conflict of authority which merits this Court's attention.

Thus, in *Smith v. State,* 140 Ga. App. 385, 231 S.E.2d 83 (1976), in which a police officer testified that the defendant "decided not to talk to us," the court distinguished both *United States v. Hale,* 422 U.S. 171 (1976), and a prior Georgia decision, and held that:

> Unlike *Hale* and *Lowe,* the improper comment here was made during a narrative on the part of the G.B.I. agent in the telling of a course of events. The remark was apparently not intended to nor did it have the effect of being probative on the guilt

or innocence of the defendant. This portion of the answer was immediately objected to and the objection sustained. Thereupon, the court warned both the witness and the district attorney to desist from that line of inquiry, and immediately gave curative instructions to the jury. At most the erroneous comment must be considered to have been of minimal effect with no adverse impact upon the defendant's right to a fair and impartial trial.

Resolution of this question in the manner urged by defendant would have the effect of creating an iron-clad rule that any reference (even unwitting or harmless) to an accused's silence at the time of arrest requires the grant of a new trial. That is not—nor should it be—the law. . . .

Under the facts of this case, . . . no reversal is required because we find that the defendant was not harmed. 140 Ga. App. at 387-388, 231 S.E.2d at 85.

On the other hand, in *Boyd v. State,* 351 So.2d 1041 (Fla. App. 1976), the court, on petition for rehearing, vacated its prior decision in the case and held that, even though no objection was made thereto during trial, a police officer's testimony that the defendant "didn't say anything" was "fundamental reversible error and of such constitutional proportion that neither objection nor admonition could correct [it]." 351 So.2d at 1042.[3]

And in *Commonwealth v. Williams,* — Pa. Super. ——, 381 A.2d 1285 (1977), the court held it to be the

[3]We hasten to note that the decisions of the Florida district courts of appeal in this area are far from consistent, and we do not mean to imply that *Boyd* necessarily represents the settled law of Florida.

law of Pennsylvania that "*any reference* to a defendant's silence after arrest constitutes reversible error in the absence of an adequate cautionary instruction." — Pa. Super. at ——, 381 A.2d at 1291 (Emphasis in original).

Finally, on the alternative question of whether, assuming that the reference to the accused's silence in this case was error of Constitutional dimensions, the error should nevertheless be deemed harmless, the numerous and conflicting cases on this issue turn so entirely upon their precise facts that little purpose would be served by extensive citation of them in this petition. We would note, however, that in *United States v. Guzman,* 446 F.2d 1137, 1140-1141 (9th Cir. 1971), cert. denied 404 U.S. 1022 (1972), the Ninth Circuit itself found "harmless error" in a federal criminal case which does not appear to be radically different from the present case; and while we called the court of appeals' attention to the *Guzman* case in our brief herein (Brief for Appellee at 2), it was not mentioned in the court's opinion.

In view of the age of the *Guzman* case, the size of the Ninth Circuit bench, and the fact that no petition for rehearing was filed herein, we do not mean to suggest that the court of appeals has applied a different standard in habeas-corpus review of a state-court conviction than it applies in federal criminal

appeals. We do suggest, however, that where, as in this case, there is only one casual reference to the fact that the accused said nothing when arrested, that reference is not made in a context which suggests that the accused was being interrogated or exercising his rights at the time, and the prosecution does not attempt to capitalize on that reference, the error is harmless, by the standards applied by the Ninth Circuit itself in *Guzman,* as well as by those applied in other jurisdictions. See, *e.g.,* the discussion of harmless error in *Smith v. State,* 140 Ga. App. 385, 387-388, 231 S.E.2d 83, 85 (1976).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon

WALTER L. BARRIE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

August, 1978

Appendices

APPENDIX A

OPINION OF COURT OF APPEALS
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY LEROY DOUGLAS, Petitioner-Appellant,	)	
v.	)	No. 77-1265
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Respondent-Appellee.	)	**OPINION**

Appeal from the United States District Court
for the District of Oregon

[July 13, 1978]

Before: SMITH,* ELY and CARTER, *Circuit Judges.*

SMITH, *Circuit Judge:*

Gary Leroy Douglas appeals from a judgment of the United States District Court for the District of Oregon (Otto R. Skopil, Jr., *Chief Judge*), dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial held in the circuit court for Coos County, Oregon, Douglas was convicted of burglary in the first degree. He was awarded an indeterminate sentence, the maximum term not to exceed fifteen years.

The Oregon Court of Appeals affirmed this conviction without opinion, 23 Or. App. 221 (1975), and the petitioner did not seek review of the case in the

*The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Oregon Supreme Court.[1] Subsequently, petitioner sought, and was denied, federal habeas corpus relief. He presently appeals that judgment of the district court.

Petitioner Douglas presents us with a single issue on this appeal. At trial, the state prosecutor called Douglas' arresting officer as a state witness. After substantial questioning, Trial Tr. at 154-159, the following colloquy took place between the prosecutor and the arresting officer.

> Q. Who arrested Mr. Douglas?
> A. I did.
> Q. Did he make any statements to you?
> A. No.
> Prosecutor: That's all the questions I have.
> [Trial Tr. at 158-159.]

Douglas argues here that his constitutional rights were violated when the prosecutor introduced evidence concerning the petitioner's exercise of his fifth amendment right to remain silent.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court indicated that "[t]he prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n. 37. More recently, that Court has held that the use for impeachment purposes of a defendant's silence at the time of arrest and after the receipt of *Miranda* warnings is impermissible. Writing for the Court, Justice Powell noted that:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
> [*Doyle v. Ohio,* 426 U.S. 610 at 618 (1976)].

See also *United States v. Hale,* 422 U.S. 171 (1975.) The Court felt that such silence was necessarily "insolubly ambiguous," and therefore—apart from any possible constitutional infirmities—was of dubious probative value.

In the instant case, the state prosecutor elicited just that kind of testimony forbidden by the Supreme Court in *Miranda v. Arizona* and *Doyle v. Ohio.* While there was no reference to *Miranda* warnings, there was purposefully elicited the fact of silence in the face of arrest. The introduction of such testimony acted as an impermissible penalty on the exercise of the petitioner's right to remain silent.

While perhaps inadvertent, the placement of the suspect question at the end of the arresting officer's testimony gave it a prominence which it would not

[1] The state acknowledges that all state remedies have been exhausted, and we have been directed to nothing in the record which would indicate that the deliberate bypass doctrine is relevant in this case.

have had, had it simply been recounted as part of a description of the events culminating in the petitioner's arrest. Thus it is plausible to suppose that a juror might have inferred from the offending testimony that the petitioner was guilty of the crime charged, and that his alibi was a later fabrication and without foundation. Given the equivocal nature of much of the evidence presented at trial, and the rather unusual, perhaps even bizarre, events recounted by both the prosecution and the petitioner, we cannot say, as a matter of law, that the prosecutor's question was harmless, beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Accordingly, we reverse the judgment of the district court, and remand the case for issue of the writ.

CARTER, Circuit Judge, dissenting:

I am not convinced that Supreme Court precedent compels the ruling in this case. Furthermore, even if the majority is correct that constitutional error occurred, the error is harmless beyond a reasonable doubt.

To explain my reluctance to join the majority, I must elaborate slightly on the facts. The testimony of the arresting officer concerning Douglas's silence after his arrest was introduced during the prosecution's case-in-chief. However, it appears to be nothing

more than an inadvertent question asked in an attempt to elicit a complete description of the event of Douglas's arrest. The question and answer were not argued to the jury as indicative of guilt, or relied upon in any other manner by the prosecution.

After the prosecution's case, Douglas put on a defense in which he presented an alibi to the jury. The evidence of Douglas's silence in the face of his arrest was never mentioned for impeachment purposes by the prosecution. In short, after asking the single disputed question in an unargumentative context, the prosecution never affirmatively incorporated the answer into either its case-in-chief or its rebuttal.

To date the case law from the Supreme Court holds that the prosecution cannot introduce evidence of an accused's silence in the face of *Miranda* warnings either as affirmative proof of guilt or for purposes of impeachment. *Miranda v. Arizona,* 384 U.S. 436, 468 n.37 (1966); *Doyle v. Ohio,* 426 U.S. 610 (1976) (Opinion of the Court and J. Stevens, dissenting). *See United States v. Hale,* 422 U.S. 171 (1975). But these cases do not establish a per se rule that under no circumstances can evidence of silence after an arrest be admitted without violating the Constitution. Before an error of constitutional dimension occurs, the evidence of an accused's silence must be used for an impermissible purpose.

In its analysis of this problem the Supreme Court has reiterated that "silence at the time of arrest may be inherently ambiguous even apart from the effect of *Miranda* warnings . . . ." *Doyle v. Ohio, supra,* 426 U.S —— n.8. *See United States v. Hale, supra.* The introduction of such evidence at trial absent comment cannot alone be said to unfairly prejudice a defendant. Only when the prosecution affirmatively uses this evidence to suggest guilt or to impeach a defendant's defense does the unfairness occur. A close reading of *Doyle* and *Hale, supra,* shows that the prosecution overtly used the defendants' silence against them. This is different from our case.

Nevertheless, I recognize that the mere elicitation of the disputed testimony could be characterized as a suggestion of guilt. Although I disagree with this approach, even if the existence of constitutional error is conceded for the sake of argument, the error was harmless beyond a reasonable doubt. The testimony elicited by the prosecution in this case consisted of nothing more than the naked remark that Douglas made no statement to his arresting officer. The evidence was not elicited in the context of testimony about the giving of *Miranda* warnings or of interrogation by the arresting officer. Even if a juror assumed that *Miranda* warnings had been given, evidence of silence in the face of such warnings is of minimal probative value.

In addition, the testimony of the victims of the burglary provided extensive affirmative evidence of Douglas's guilt, including his admission of guilt when confronted by the victims. Any possible adverse impact of the prosecutor's question must have been minimal. I would affirm the judgment of the district court.

APPENDIX B

OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GARY LEROY DOUGLAS,	)	
	)	
Petitioner,	)	Civil
	)	No. 76-880
vs.	)	**RECOM-**
	)	**MENDATION**
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	**AND ORDER**
	)	
	)	
Respondent.	)	

Gary Leroy Douglas, petitioner, seeks a writ of habeas corpus, pursuant to 28 U.S.C. §2254.

Respondent has petitioner in his custody pursuant to the following sentence order:

From the Circuit Court of the State of Oregon for the County of Coos, in Case No. 8676, dated April 21, 1975, after a jury verdict of guilty of the crime of Burglary in the First Degree, for a sentence to be [sic] legal and physical custody of the Corrections Division of the State of Oregon, for an indeterminate period of time, the maximum term of which shall not exceed fifteen (15) years.

Petitioner alleges in his petition that the state adduced evidence at trial of petitioner's silence after receiving Miranda warnings at the time of his arrest.

Petitioner argues that consideration of the above evidence by the trier of fact violated his due process rights under the Fourteenth Amendment to the Constitution.

Petitioner is raising the same claim he previously raised at trial and on appeal before the courts of the State of Oregon. No evidentiary hearing before this court is necessary. *Townsend v. Sain,* 372 U.S. 293 (1963).

At trial the following colloquy occurred between the District Attorney and Deputy Sheriff Dale Willis:

"Q. Who arrested Mr. Douglas?
A. I did.
Q. Did he make any statements to you?
A. No." (Tr. 158 and 159)

Defense counsel promptly moved for a mistrial on the ground that the defendant had been prejudiced by disclosure of the fact that defendant did not make any statements at the time of his arrest. The court denied the motion for mistrial on the ground that defendant was not prejudiced by the above testimony.

Absent a violation of a federal constitutional right, state court rulings on admissibility of evidence are not grounds for federal habeas corpus relief. *Lisenba v. California,* 314 U.S. 219 (1941), *reh. denied,* 315 U.S.826; *Crisafi v. Oliver,* 396 F2d 293 (9th Cir. 1963), *cert. denied,* 393 U.S. 889.

It is impermissible to disclose to a jury that a

defendant has exercised his/her constitutional right not to incriminate him/herself. *State v. Hunt,* 15 Or. App. 76 (1973). The case at bar is not a case in which a jury learned of a refusal to talk after testimony of Miranda advice. There is no testimony of preceding Miranda advice, police interrogation or of defendant's refusal to talk. Here there is merely testimony of an arrest and that no statements were made. The testimony in this case did not result in prejudice of constitutional dimensions, if at all. A review of the record demonstrates any error by the trial court was harmless, beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Respondent's motion to dismiss the petition pursuant to Fed. R. Civ. P. 12 should be granted.

DATED this 17th day of December, 1976.

Michael R. Hogan
UNITED STATES MAGISTRATE

After review of the file and record, I adopt the above recommendation.

Respondent's motion to dismiss is granted and the petition for a writ of habeas corpus is dismissed.

IT IS SO ORDERED.

DATED this 22nd day of December, 1976.

Otto R. Skopil, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

EXHIBIT 3 — APPELLANT'S BRIEF, STATE v. DOUGLAS, 23 Or. App. 221, 541 P.2d 833 (1975) (excerpt)

[2]

STATEMENT OF FACTS

Jerry Cochran, his wife, Delva Cochran, her sister, Debbie Miller, Phillip Albourn and Ken Jones all rent the same house where Jones owns stereo equipment worth approximately $2,000 (Tr 11-12). On January 28, 1975, the group (except for Jerry Cochran) went into Coquille to watch a movie. On their way, they stopped at a tavern to get something to eat and drink; and while there, Jones recognized defendant's car parked at the tavern (Tr 25-26). When they returned from the movie, they discovered Jones' stereo equipment was missing (Tr 23).

The group pondered any possible suspects and measured the distance between automobile tire tracks left on the property (Tr 29-30). They decided the "main suspect" would be defendant because he was the only non-relative who had been to the house (Tr 31). Defendant's previous visit took place a few weeks earlier; and during this visit, he stated he was a safecracker and had been a prisoner (Tr 33).

Jones and Albourn proceeded to defendant's residence in an attempt to discover whether defendant had the stereo. They met defendant on the road and told him they came by to visit him (Tr 40). Defendant stated he was on his way to get a beer to which Jones and Albourn said they would accompany him. The tavern was closed so the group ended out in defendant's trailer visiting and drinking beer (Tr 41-43). Jones and Albourn were unable to discover the

[3]

presence of the stereo so they left; however, on their way they measured the distance between the tire tracks left by defendant's car which were the same width as the earlier measurements taken (Tr 46-48).

Directly after departing, Jones and Albourn parked a short distance from defendant's residence in hopes of observing defendant transport the stereo equipment (Tr 50). In approximately twenty minutes, defendant entered his car and left with Jones and Albourn following (Tr 50-51).

They followed defendant to an area known as Four Corners where defendant drove into a ditch. Jones and Albourn stopped and offered to assist; and after noticing two of his stereo speakers in defendant's car, Jones got an unloaded pistol from his car and used it to motion defendant away from his car (Tr 53-54). After

Albourn opened defendant's car door and observed the remaining stereo equipment, he removed it to Jones' car (Tr 54-56). Defendant admitted the burglary and proposed to Jones and Albourn that he sign a statement admitting the act (Tr 59-60). Jones and Albourn rejected the offer and drove to a gas station where they had defendant sit (Tr 55).

At this time, Jones and Albourn decided to put defendant in their car to enable one of them to contact the police while the other watched defendant. As Albourn came around to get defendant, he stuck a knife to Albourn's throat (Tr 56). Jones grabbed the pistol and hit defendant

[4]

with it; but the gun broke, and defendant did not lose control over Albourn (Tr 57-58). Albourn finally broke the knife blade and escaped from defendant's control cutting himself in the struggle (Tr 62).

The following day Jones and Albourn reported the incident to the district attorney's office and the police. Deputy Willis questioned Jones, and subsequently he arrested defendant (Tr 154, 158).

At trial, the prosecutor asked Willis if he was the arresting officer, and Willis said he was. He then asked Willis if defendant made any statements, and Willis said "No" (Tr 159).

Defendant's testimony disputed that of Jones and Albourn. He testified he was in the Homestead Tavern on January 28 from approximately 5:15 to 7:15 p.m. (Tr 234). At 7:15 he left for a friend's house and returned to the tavern at approximately 7:30 p.m. At 7:35 Greta Haug, his girlfriend, arrived and the two had a glass of beer. They left for home at approximately 8:30 p.m., and about forty-five minutes later they ate dinner (Tr 212-214). At approximately 10 p.m. defendant returned to the tavern but it was closed. He testified Albourn and Jones were at the parking lot and that they approached him and asked to return to his house and have a beer (Tr 214-215). Defendant agreed, and the visit lasted for approximately thirty minutes (Tr 218).

[5]

Following Jones' and Albourn's departure, defendant loaded garbage on top of his car and proceeded to the dump (Tr 224). As defendant approached Four Corners, a car pulled up beside him that startled him and forced his car into a ditch (Tr 225-226). Defendant testified that, after he got out of his car, Albourn approached and kicked him in the groin, Jones pointed a gun at him, and Albourn demanded their "stuff" (Tr 226-227). An argument ensued; and, after Albourn told Jones, "Let's load him in the bus, take him out,

shoot him and leave him," defendant grabbed Albourn, put a knife to his throat, and told Jones to drop the pistol which he did (Tr 228-230). Albourn fought defendant, and Jones grabbed the pistol and hit defendant in the head with it. Jones and Albourn then left the scene, and defendant started for a trailer house to call the police (Tr 230). Defendant decided not to call the police; instead, he got help in removing his vehicle from the ditch and returned home (Tr 231-232). Defendant testified he believed Jones and Albourn were drunk, and for this reason he did not report the incident (Tr 232).

Defendant denied referring to himself in any way as a burglar during the visit to Jones' and Albourn's residence (Tr 221). In addition, he denied both admitting the burglary to Jones and Albourn and making the proposal to Jones and Albourn that he sign a statement admitting the act (Tr 228).

[6]

Greta Haug also testified at trial, and her testimony essentially supported defendant's version of the facts concerning his activities from 8:10 p.m. until 10:00 p.m. (Tr 185-190).

Leon Howell, a mechanic, testified that he measured the tire width of defendant's car, and the distance was different than the distance attested to by Jones (Tr 207).